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Chairman: Mr. Bennouna ..... (Morocco)
later: Mr. Dhakal (Vice-Chairman) ..... (Nepal)

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The meeting was called to order at 9.40 a.m.

Agenda item 144: Report of the International Law Commission on the work of its fifty-sixth session (*continued*) (A/59/10)

1. **Ms. Swords** (Canada), referring to the draft articles on diplomatic protection, said that the progressive development of international law contemplated in draft article 8 reflected a real need arising from the interplay of statelessness, refugee status and rules relating to the acquisition of nationality. In the initial overall review of the draft articles Canada had noticed, in terms of their scope, a fairly fundamental ambiguity which needed to be resolved as it went to the very meaning of diplomatic protection and hence had an impact on the approach taken throughout the draft articles. The definition of diplomatic protection in draft article 1 appeared to be limited to cases where a State adopted in its own right the cause of its national. That would exclude some of the consular functions in the Vienna Conventions. However, in the internal discussions conducted on the draft articles, based on examples in the commentaries on specific draft articles, it had become apparent that, for some, the scope of coverage of the draft articles included consular functions as covered by the Vienna Conventions. If the intent of the draft articles was to apply to assistance to nationals as defined in the Vienna Conventions, the approach to nationality would become particularly relevant to certain obligations in those Conventions. The Vienna Convention on Consular Relations, in particular, created specific obligations between States concerning the treatment of foreign nationals. A case in point was the obligation in article 36 of the Convention on Consular Relations to notify detained foreign nationals of the right to contact their consular post. Canada attached considerable importance to that obligation, which deserved to be the subject of a common understanding among States.

2. Predominant nationality was the approach taken in draft article 7 in respect of multiple nationality and claim against a State of nationality. Within the context of the Vienna Convention on Consular Relations, the consular functions of a discretionary nature listed in article 5 of the Convention were triggered by nationality, but so were obligations such as those in article 36 to notify detained persons of certain rights. She wondered whether the Commission intended that the approach to predominant nationality stated in article 7 should be applied to situations where a treaty obligation was triggered by foreign nationality. Canada sought to provide consular assistance to Canadian citizens regardless of any other nationality they might possess, but it was aware that many States did not feel obliged under international law to provide consular access to their own nationals, even if they also held another nationality. The draft articles could become important and influential tools for all to use. It was therefore all the more important to clarify their intended impact on existing policies of broad consular support and on treaty obligations that were triggered by nationality.

3. **Mr. Läufer** (Germany), referring to the topic of diplomatic protection, said that Germany once again fully subscribed to the legal position currently expressed in draft article 2, which stated that under international law the exercise of diplomatic protection constituted a right, but not a duty, of States. At the national level, even if for reasons of constitutional law the State was under an obligation to exercise diplomatic protection, it still had a large margin of discretion as to how to comply with that obligation, as upheld recently by the Federal Constitutional Court of Germany. At the international level, the concept of diplomatic protection had to be distinguished from other concepts of law which dealt with the protection of individuals and, in particular, from the regime of human rights which imposed clear obligations on States. On the whole, Germany agreed with the rules adopted by the Commission for the diplomatic protection of legal persons. The Commission gave priority to the rights of the State of nationality of the corporation, but when it came to the protection of shareholders, the rights of the State of nationality of those persons were normally not taken into account. The State of nationality of the shareholders might exercise its right to diplomatic protection only in situations where the corporation had ceased to exist for reasons unrelated to the injury, or where the injury had been caused by the State of nationality of the corporation. Germany, however, still believed that the exceptions currently embodied in article 11 might be too rigid and might not adequately take into consideration situations where, for reasons of equity, the State of nationality of the shareholders should exercise the right of protection. That notwithstanding, Germany accepted the Commission's overall objective, which was to avoid situations of overlapping claims, as

had been the reasoning of the International Court of Justice in the *Barcelona Traction* case.

4. Regarding the topic of international liability for injurious consequences arising out of acts not prohibited by international law, the Commission had taken an important step in the further development of standards in a field of international law that, in an age of globalization and the advancing spread of technology, was not only full of opportunities for mankind, but also rife with new risks. In particular, environmental damage of massive transboundary dimensions was an increasingly observed phenomenon which raised difficult legal issues, especially with regard to liability. The Commission had chosen an interesting approach which found a third way between pure State liability and liability between private parties governed by international law. That third way envisaged States entering into obligations under international law to open up avenues under civil law for liability and compensation claims, an approach which seemed to be set out in Principle 4 of the Commission's report. Germany, however, had its doubts as to whether that would be a workable compromise between the existing approaches. While it would bring greater flexibility and allow the individual contracting parties to take into account the special features of various risks, that advantage would be cancelled out by two disadvantages, namely: the creation of liability conventions which, in contrast to the current ones, would not be self-executing, thus reducing their enforceability. Moreover, the end result of greater flexibility was reduced legal certainty, which could lead to additional costs, particularly in fields of economic relevance. On the whole, notwithstanding all the difficulties inherent in the current approaches, Germany felt that agreements that created direct liability claims under civil law were preferable, an approach reflected in article 4, alternative B, as originally proposed by the Special Rapporteur. That approach would be more in line with the "polluter pays" principle.

5. Germany was also of the opinion that the time was not yet ripe for a binding general convention on liability since the types of transboundary environmental risks to be covered were still too heterogeneous. Some kind of framework convention (model law) and a high-level reference document which extracted commonalities from existing treaties and carefully developed them would be more helpful for the future development of international law in that area. To that extent, he welcomed the principles elaborated by the Commission. In Germany's view, a future model law should contain the following core elements: prompt response measures to prevent loss or damage caused by an environmental incident; adequate financial security, achieved in particular by insurance obligations and/or the establishment of a fund; and the creation of effective judicial protection, particularly in transboundary cases. All those elements seemed to be reflected in Principles 5 to 7 and would be critical to the achievement of the overall goal of providing victims of transboundary environmental damage with prompt and adequate compensation.

6. **Mr. Romero** (Brazil) noted with satisfaction that diplomatic protection, as defined in draft article 1, only arose within a context of peaceful settlement of disputes between States and never, except as provided for in Article 51 of the Charter of the United Nations, through recourse to the threat or use of force. By definition, diplomatic protection pertained to States that exercised it at their discretion and not at the behest of individuals, as set out in draft article 2. For that reason, it was not to be confused with human rights issues, even though in certain circumstances it might be exercised under conditions that involved the protection of human rights. As concerned the protection of crews at sea, he recalled that the United Nations Convention on the Law of the Sea provided the framework for addressing issues relating to prompt release and compensation. Brazil recognized, however, that the approach based on the flag State or State of registration enshrined in that Convention did not address some issues that might be usefully explored in the context of diplomatic protection. Brazil welcomed the proposals on the exhaustion of local remedies, which accorded with central tenets of customary law on diplomatic protection, and considered that the notion of reasonable possibility provided a useful framework for developing that concept. Proposals to widen possible exceptions, however, must only be considered on the basis of precise criteria applicable to specific circumstances. Proposals involving implicit waiver, in particular, should not give rise to the possibility of excusing interventions against the domestic jurisdiction of the State where the foreigner was located. Brazil agreed with those who believed that the Calvo clause involved complex issues that would require further consideration by the Commission.

7. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law, Brazil believed that codification in what was still a new field of international customary law was required and, for that reason, specific rules on liability and reparation would be needed. Brazil agreed with other delegations that the operator, having direct control over operations, should bear primary responsibility in any procedure to deal with losses, as provided for in the "polluter pays" principle. Obviously, that regime must strike a fair balance between the rights and obligations of operator, beneficiary and victim.

8. **Mr. Deo** (India) said that a State's obligation and entitlement to protect its subjects when they were injured by acts contrary to international law committed by another State from which they had not been able to obtain satisfaction through normal channels in that State constituted an elementary principle of international law, to be exercised with discretion, as each State was free to accept or refuse to exercise diplomatic protection as it saw fit.

9. Diplomatic protection should serve the interests of nationals as far as possible, and the concerns of the individuals involved should not be stretched beyond the point where it became obligatory for the State of nationality to espouse their claims, ignoring its own political or other sensitivities. Extending diplomatic protection to stateless persons and refugees as proposed in draft article 8 was undesirable because such an extension would be susceptible to wider interpretation by the State of habitual residence of the stateless person; the phrase "lawfully and habitually resident" appearing in draft article 8, paragraph 1, referred only to the national law and not to an international standard. Article 8, paragraph 2, which entitled a State to exercise diplomatic protection in respect of a person recognized as a refugee also raised concerns, departing as it did from the traditional rule that only nationals might benefit from the exercise of diplomatic protection. In addition to that, the term "refugee" in paragraph 2 was not limited to its definition in the 1951 Convention relating to the Status of Refugees. According to the commentary, the term was intended to cover refugees recognized by certain regional instruments as well. His delegation had difficulty in accepting any definition of refugee which deviated from the universally accepted definition.

10. The report of the Special Rapporteur on allocation of loss in case of transboundary harm arising out of hazardous activities provided an in-depth analysis of the need to protect the interests of innocent victims. India was of the view that the scope of the topic and the triggering mechanism should be the same as in the case of prevention of transboundary harm. In a scheme covering either liability or a regime of allocation of loss, the primary responsibility should be that of the operator, as that person was in command and control of the activity and was duty-bound to redress the harm caused. The draft had achieved a significant breakthrough by suggesting a scheme which was not only general, but also flexible, without any prejudice to the claims that might arise and the applicable law and procedures. That flexibility was further strengthened by the focus on principles rather than on rules, but some of the draft principles had gained only sectoral acceptance, and had not found acceptance in general State practice. India was concerned about the enlarged scope of the draft text which sought to incorporate some elements in the definition of damage, such as Principle 2, which defined the term "damage" as including significant loss caused to the environment, and Principle 2 (a) (iii), which referred to loss or damage by impairment of the environment. The commentaries on the draft principles indicated that transboundary damage caused to the environment per se could be the subject matter of compensation. That idea was not supported by sufficient State practice from which general principles could be derived. Moreover, the environmental losses referred to in Principle 2 (a) (iii) could not easily be quantified in monetary terms, besides causing difficulties in establishing locus standi. For all those reasons, that element of damage needed a suitable modification.

11. In several international multilateral legal instruments, the application of environmental protection standards different from those accepted by developed countries in matters of environmental protection had been allowed as a way of promoting the right to development as an element of sustainable development. The general commentaries on the draft principles underscored the importance of that view, acknowledging as they did that the choices and approaches for the draft principles and their implementation might be influenced by the different stages of economic development of the countries concerned. India, therefore, welcomed the draft

principles and hoped that the provisions that were detrimental to the interests of developing countries would be properly considered in the Commission with a view to paving the way for wider acceptance of the draft.

12. **Mr. Akiba** (Japan) said that the restrained approach adopted by the Commission with regard to the draft articles on diplomatic protection was the right one, since it did not expand the scope of the draft. For example, it was correct not to include the subject of functional protection provided by international organizations.

13. When discussing the issue of diplomatic protection, it was important to be mindful of the overlap in scope with other areas of international law. For example, the treatment of foreign individuals was now covered in a more extensive and comprehensive manner through international human rights law. It could also be pointed out that rights concerning foreign investments could be better protected by a variety of arbitration clauses in investment treaties, as private parties were entitled to seek remedies directly from the recipient State of their investment.

14. That was a recent trend in international law, however, and should not be confused with the rules concerning diplomatic protection. With regard to the protection of foreign investments, for example, two processes — the invocation of diplomatic protection and arbitration under bilateral agreements — required a clear line of demarcation, although they both appeared to protect the same interests of the party concerned. While it was true that some agreements between States ensured that diplomatic protection could not be invoked when investment arbitration based on such an agreement was triggered, it was nevertheless useful to include in the articles on diplomatic protection a clause to clarify the relationships among the various approaches which seemed to protect the interests of both natural and legal persons.

15. In that connection, with regard to the previous article 21 on *lex specialis*, there remained a possibility that it would categorically and completely preclude any possibility for a State to apply the draft articles to diplomatic protection. The proposed new language for article 18 on special treaty provisions had been carefully drafted using much more general terms and bearing in mind such concerns, which was a considerable improvement.

16. Japan also hoped that, on second reading, the members of the Commission would maintain their prudent and restrained approach and not become too ambitious in expanding the scope of their discussion. The Commission had a long and positive history of contributing to the codification and progressive development of international law. It was true that international law might require aggressive and drastic change in order to respond to the contemporary concerns of international society, but it was too ambitious to expect that the codification of the draft articles on diplomatic protection would reflect a major development in international law.

17. The issue of international liability covered an extremely wide range of areas and had major implications for international law in several fields, such as maritime transport of hazardous materials, space exploration and various industrial activities. There were numerous conventions and arrangements for such activities, covering both States and operators, and the task assigned to the Special Rapporteur was enormous in that it necessitated the identification of some common elements among all those diverse areas. Against that background, Japan believed that the Special Rapporteur had taken the right path in choosing to first point out some general principles, rather than attempting to create a detailed and comprehensive structure through the drafting of specific articles.

18. It had been foreseen from the beginning of the current quinquennium that the discussion on that topic would encounter many challenges. Given the very diverse nature of the issues that might be covered, some concerns had been expressed as to whether it would be possible to present an overall structure on the matter. In that regard, the Commission had been wise to rely on its own recent work on the draft articles on prevention of transboundary harm. It had also been appropriate for the Commission to put considerable emphasis on the primary responsibility of operators. The drafted principles might require further clarification and improvements in such areas as the definition of terms and how to guarantee prompt and adequate compensation. However, the role of States should not be given too much emphasis in that regard, as most of the activities being considered were conducted by private operators. Articles placing undue emphasis on the responsibility of States in the aftermath of an incident resulting in damages were

likely to be both unnecessary and an inaccurate reflection of the current reality of international law.

19. In their current form, the draft principles were still very general. At the same time, given their broad scope, there was some doubt as to how much more specific and detailed the drafting could be. At such an early stage, Japan did not have any specific preference for the structure of the principles or articles to be produced by the work, or for the final outcome. It was to be hoped that after the discussion in the Commission on second reading, there would be a growing sense of what shape the final outcome should take, whether a set of principles for guidelines or more detailed articles suitable for further development into a convention.

20. **Mr. Dolatyar** (Islamic Republic of Iran) said that draft article 2 clearly reflected customary rules of international law and was in line with international jurisprudence. A State might have an obligation under its own domestic law to extend diplomatic protection to a legal or natural person of its nationality, but in international law there was no such obligation upon States.

21. At the international level, when a State asserted diplomatic protection on behalf of a national, it was in fact protecting its own, rather than the national's, right; that argument was consistent with the fundamental principle of diplomatic protection, that an injury to a national was an injury to the State of nationality. Domestic law thus served as an auxiliary apparatus for States to decide in which cases they were willing to exercise diplomatic protection.

22. In draft article 4, the Commission had eloquently stated the right of States to determine who their nationals were. However, as the article stipulated, and as the Commission pointed out in paragraph 6 of its commentary, the acquisition of nationality must not be inconsistent with international law. The Islamic Republic of Iran believed that States should avoid adopting laws which increased the risk of dual nationality, multiple nationality or statelessness. Neither the acquisition nor the granting of citizenship should be inconsistent with international law.

23. With regard to draft article 5, paragraph 2, on the exercise of diplomatic protection by a State in respect of the person who was its national at the date of the official presentation of the claim but was not its national at the time of the injury, the Commission had not referred to any State practice in its report. The Islamic Republic of Iran did not share the Commission's view that the current language of article 5, paragraph 2, properly addressed the concern regarding "nationality shopping" expressed by some members of the Commission. The language of that paragraph needed to be revised in order to clearly limit the exception to the continuous nationality rule to cases of involuntary loss or imposition of nationality.

24. With regard to draft article 7, the determination of predominant nationality was a subjective question. In practice, any State whose nationality was invoked by a person with dual or multiple nationality might claim that its nationality was predominant, since there were no established criteria in international law to determine the predominance of one nationality over any other. The Commission suggested, in paragraph 6 of its commentary, a range of factors to be taken into account in determining the predominant nationality. The list included factors such as curricula and the language of education, or bank accounts, which in his delegation's view could never be considered as valid factors for deciding which nationality was predominant. In an era of globalization, there were millions of individuals who were born and grew up in one country, were educated in another and worked or lived in yet another. Prevailing criteria were needed. A State whose nationality was used by an individual in order to acquire or possess property or whose passport that individual used in order to enter the country without a visa might legitimately claim that its nationality predominated over the nationality of the State where the individual was habitually resident or had been educated.

25. In the commentary on draft article 7, the Commission had relied heavily upon decisions of the Italian-United States Conciliation Commission and awards of the Iran-United States Claims Tribunal. The Islamic Republic of Iran saw those decisions and awards as *lex specialis* rather than as the general practice of States or an expression of customary international law. It considered that draft article 7 did not reflect customary international law and might give rise to new controversies between States with citizens of dual nationality. Moreover, the Commission had pointed out that draft article 7 was framed in negative language to show that the circumstances it envisaged were to be regarded as exceptional. In his delegation's view, the negative language was not sufficient for the purpose: the Commission's intention was to confine the

paragraph to exceptional cases, but in reality cases of dual or multiple nationality were not exceptional.

26. The Islamic Republic of Iran believed that draft article 13 went beyond the permissible limits of progressive development of international law. As to exceptions to the local remedies rule, his delegation had concerns over the broad and ambiguous formulation of exceptions in draft article 16, which had the potential to jeopardize the rule and make it redundant in most cases. With regard to paragraph 4 of the commentary on draft article 16, the Islamic Republic of Iran shared the Commission's view that it was for the competent international tribunal to determine the admissibility of a claim of exception to the local remedies rule and would prefer to see that point duly reflected in the text of the draft article.

27. Lastly, his delegation noted that the Commission had decided to consider the relationship between the clean hands doctrine and diplomatic protection. It believed that the question deserved further study and welcomed the Commission's decision to return to the question at its next session. In the view of his delegation, the State of nationality could not be deprived of its right to exercise diplomatic protection when the charges against its national were unrelated to the claim for which it was seeking diplomatic protection.

28. **Sir Michael Wood** (United Kingdom) said that, as the Commission had noted, the draft articles on diplomatic protection were closely connected to those on State responsibility, and must be read in the context of those articles. The Commission had been wise to adopt that approach, and to maintain the focus of the draft articles on admissibility of claims issues — in other words, nationality and local remedies. As the report stated, those articles gave content to article 44 of the draft articles on State responsibility. The Commission had likewise been right to reject the proposition, explicitly made *de lege ferenda*, that the State should have a duty at the level of international law to exercise diplomatic protection. He noted with satisfaction that draft article 2 referred to the right to exercise diplomatic protection, not to any obligation or duty to do so.

29. Rules on the nationality of claims were set forth in Part Two. In large measure they conformed to existing State practice and did not call for special comment, but certain innovations had been suggested, and must be looked at carefully between the first and second reading to see whether they really made sense in terms of both principle and practicality.

30. For example, with regard to the nationality of natural persons, he wished to mention the introduction in article 4 and article 5, paragraph 2, of the words "not inconsistent with international law" in connection with the acquisition of nationality; the words "for a reason unrelated to the bringing of the claim" in article 5, paragraph 2, which might need to be refined further; the concept of "predominant" nationality in article 7, which also needed to be examined, as the representative of India had pointed out; and article 8 on stateless persons and refugees (including the meaning of the term "refugee").

31. The nationality rules for legal persons raised more difficult issues which required further careful study. He wondered, for example, whether it was practical to allocate the right of protection of a defunct company to the State of nationality of the company rather than the State or States of the shareholders and whether the former had any real interest in taking action if the shareholders came from another State; why it should not be possible to make a claim if a company had ceased to exist for a reason unrelated to the injury, as the shareholders had still suffered; and why the right to protect shareholders against the State of nationality of a company should be limited to the case where the company was required to incorporate in the State concerned in order to carry on business there. The Chairman of the Commission had described those proposals of the Commission as a balance, but the balance did not appear quite right.

32. Draft article 13, dealing with other legal persons, might also usefully refer to articles 11 and 12 as well as articles 9 and 10, since such other legal persons might be persons comparable to shareholders.

33. The draft articles on local remedies contained in Part Three seemed broadly to have been drafted along the right lines, although further clarification might be needed. On the "clean hands" doctrine, he agreed with the Special Rapporteur's conclusion that there was no reason to include such a provision in the draft articles.

34. With regard to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities), the set of draft principles — as

the representative of India had pointed out — was very general and had a very wide scope; for example, they referred to a "significant" threshold in draft principles 1 and 2 and to very broad definitions of "damage" and "environment" in draft principle 2. The primary aim should be to elaborate a set of general principles which could be drawn upon as appropriate when new agreements or domestic legislation were under consideration. The project did not seem to be one of codification or even progressive development in the traditional sense. It would be helpful if the Commission could clarify what it saw as the status of the various elements of the draft. For the reasons given, the United Kingdom strongly supported the current approach of the Commission, i.e., a set of principles to be adopted in a non-binding form.

35. With regard to substance, more thought must be given to the relationship between the draft principles and the draft articles on State responsibility. For example, the commentary on draft principle 1 suggested that liability under those principles might arise concurrently with State responsibility, but would then be an additional basis for claims. Guidance on how duplication of claims or recovery could be avoided in such circumstances would be welcome. The notion of the State as victim in draft principle 3 again raised the question of the relationship with the draft articles on State responsibility. The preamble might be one place to deal with that relationship. More generally, with reference to draft principle 7, it might be desirable to include also a more explicit *lex specialis* clause along the lines of article 55 of the draft articles on State responsibility.

36. His delegation would have expected to see more prominence given, in the preamble and in draft principle 4, to the "polluter pays" principle. Draft principle 4 must be carefully studied, particularly the application of no-fault liability under paragraph 2. In existing environmental agreements strict liability seemed to be limited to certain hazardous activities and then was subject to limited liability and other special procedures. To impose strict liability in respect of all "significant" damage seemed very sweeping. In addition, the hint of residual State liability under paragraph 5 was problematic.

37. **Mr. Lavalle** (Guatemala), referring to the topic of diplomatic protection and to paragraph 7 of the commentary on draft article 1, said that the rules of diplomatic protection clearly should not apply if a State in whose territory a diplomatic or consular agent exercised their duties failed to comply with its obligations towards those persons or their property or their privileges and immunities under the relevant articles of the Vienna Conventions on Diplomatic and Consular Relations. However, he believed that diplomatic protection should apply to injuries which that State might cause to such persons outside the exercise of their duties and outside the scope of the articles in question. As an example, diplomatic protection would apply to the seizure without compensation of the personal property of a diplomatic agent in the country in which he or she was accredited.

38. In the case of draft article 5, an exception should be made to the rule of continuous nationality if, within the period described in paragraph 1 of that article, a stateless person or a refugee protected under draft article 8 acquired the nationality of the State exercising protection.

39. With regard to the conditions established in article 9 for determining the nationality of a corporation he considered that, in line with some of the ideas expressed in paragraph 85 of the report, there was room for a condition stipulating a genuine link or relationship and one stipulating the place in which the corporation's principal economic activities were carried out.

40. The term *corporation* used in Anglo-American law applied to more than what was known in Spanish as a *sociedad anónima* and in French as a *société anonyme*; the latter term appeared in the authentic French text of the Judgment of the International Court of Justice in the *Barcelona Traction* case and corresponded to what the English version of the Judgment termed a *limited company whose capital is represented by shares*. He recommended that the terms *société* and *sociedad* in draft articles 9 to 12 should be replaced by the terms *société anonyme* and *sociedad anónima*, respectively.

41. In civil law systems, there was an intermediate form of commercial company between a limited company (*sociedad anónima*), which was characterized by having its capital represented by shares which restricted the shareholders' liability and were freely transferable, and a partnership (*sociedad de personas*), in which shareholders bore full responsibility for debts and could not transfer their shares of the capital. That intermediate commercial company was the limited

liability company, which fell within the scope of draft article 13 and, as a consequence, was covered where appropriate by draft articles 9 and 10, but not by draft articles 11 and 12, which were not referred to in draft article 13. However, draft articles 11 and 12 should apply to limited liability companies and their shareholders. The reference in draft article 13 to "9 and 10" should therefore be replaced by "9 to 12 inclusive", and paragraph 4 (of the commentary on draft article 13) should refer specifically to limited liability companies. That would make it clear that, for the purposes of draft articles 11 and 12, shareholders in a limited liability company were equivalent to shareholders in a limited company.

42. The principle that a State must expressly waive its rights was well established in customary international law. However, the comments on draft article 16 were not very clear on the application of that principle to the exhaustion of local remedies, perhaps because the principle had only one exception, as set forth in the last two sentences of paragraph 16.

43. **Mr. Abraham** (France) reiterated his delegation's concern about the late distribution of the report in the six official languages, which meant that there had been insufficient time to study and reflect on its content; he therefore invited the Commission and its secretariat to try very hard to find some means of redressing the situation.

44. The evolution of the Commission's programme of work gave rise to concern, for it contained five topics on which unequal progress had been made, although the Commission might have been expected to achieve significant advances in the 10 weeks of its annual session. If a decision was taken to expand the programme, it would be necessary to establish priorities, especially in the light of the Commission's proposed future work on the topics in question; the Commission should in fact give emphasis to those topics which might lead to some form of codification or the adoption of useful guidelines for the interpretation of the conduct of States. For example, the value of the topic of fragmentation of international law was primarily academic, and even some of the members of the Study Group had expressed doubts about the possibility of undertaking normative work in that area. In contrast, the Commission's work on the topic of unilateral acts of States might prove very useful, provided that the Special Rapporteur followed the recommendations of the Commission and its Working Group scrupulously. To date, the descriptive list of unilateral declarations of various sources and types was insufficient as the basis for an authentic repertory of practice that could underlie the codification of the law relating to unilateral acts; as the Working Group had suggested, it would be more useful to construct an analytical framework to facilitate the work of synthesis.

45. As to the topic of diplomatic protection, the Commission should focus on improving the text and supplementing it in various respects, including, for example, the effects of diplomatic protection. His delegation would address its comments primarily to the draft articles on protection of corporations and their shareholders. In draft article 9 the Commission had opted for the double criterion of place of incorporation and location of the registered office in determining a corporation's State of nationality. That solution was more prudent than an alternative formula, but the situation with regard to the protection of a corporation having its registered office in a State other than the State of incorporation remained unclear.

46. Draft article 11 (Protection of shareholders) gave rise to an even more serious problem, for its basic premise was disputable: it evoked the possibility of determining the State of nationality of the shareholders, thus allowing the exercise of diplomatic protection on an exceptional basis when injury was caused to the corporation. That conflicted with the reality of international economic relations and might generate a multiplicity of converging claims against the State presumed to have caused the injury. By casting the draft article as a negative provision, the Commission had sought to underline the fact that the State of nationality of the shareholders could exercise diplomatic protection on an exceptional basis only in the two situations that had been recognized by the International Court of Justice in 1970 in the *Barcelona Traction* case; the Court, however, had not given an opinion on the conditions constituting those exceptional situations. His delegation did not consider the condition set out in paragraph (a) of draft article 11 to be acceptable, for it would create a very broad scope for entitlement to protection by the State of nationality of the shareholders; nor could it accept the second "exception" envisaged in paragraph (b), for it would disrupt the balance between the advantages to the shareholders of owning stock in a company incorporated in a foreign State and the risk which they

assumed by accepting that the company had the nationality of that State.

47. Lastly, draft article 13 sought to determine whether it was permissible for legal persons other than corporations to invoke diplomatic protection. Given the scant practice in that area, it was impossible to assert that the regime of diplomatic protection of all legal persons should be the same as the regime applicable to corporations. It would be wiser in the end to adopt a "without prejudice" clause.

48. **Ms. Bole** (Slovenia) said that her country strongly supported the development of international law in the area of international liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) and welcomed the resumption of the Commission's work on international liability. In his report the Special Rapporteur had analysed correctly the observations of States on the main issues concerning allocation of loss in case of transboundary harm arising out of hazardous activities and had drawn conclusions in the light of those observations.

49. As in the case of the work on prevention, the final version of the draft principles should take the form of draft articles, for that approach laid the foundations for a binding legal text. It would also facilitate the development of more detailed and specific regimes in international agreements concluded on a regional and bilateral basis, and would ensure the adoption of prompt remedial measures, including compensation for activities which risked causing significant transboundary harm.

50. With regard to the relationship between international and national liability regimes, it was acknowledged that substantive national law applicable to compensation claims involved in most cases civil or even criminal liability. The proposed scheme was general and flexible enough and would operate without prejudice to such claims and the applicable law.

51. Draft principle 4, which provided for prompt and adequate compensation and imposed the primary liability on the operator, was in keeping with the principles of the Rio Declaration on Environment and Development and other practice which applied the "polluter pays" principle. It also reflected the important function of the State in establishing the conditions for imposing liability on the operator.

52. **Mr. Winkler** (Austria) said that his preliminary remarks would focus on draft articles 17 and 18, on diplomatic protection. The two articles dealt with separate issues. One related to actions or procedures for the protection of human rights and the other to dispute settlement procedures provided for in bilateral or multilateral investment treaties. For the sake of clarity the Commission should keep those two issues apart and not merge them into a single provision, for they used different drafting techniques: draft article 17 was a "without prejudice" clause, whereas draft article 18 was an "exclusion" clause. The broad language of draft article 17 raised problems, for it was not restricted to redress for indirect injury but also included the measures envisaged under the regime of State responsibility for redressing direct injuries, including resort to countermeasures. However, the commentary clearly reduced the scope of the provision to procedures for obtaining compensation for injuries suffered by individuals. The text even implied that a State might exercise diplomatic protection even when an individual had already instituted proceedings before a human rights court. The State causing the injury would have to accept multiple claims entered both by the State exercising diplomatic protection and by the individual instituting human rights proceedings. However, diplomatic protection and other "actions or procedures" to seek redress were not entirely independent of each other: in accordance with article 53 of the draft articles on State responsibility, countermeasures were excluded if redress proceedings had been instituted. That applied equally to redress proceedings instituted by individuals.

53. Draft article 18 raised other questions because it used a different drafting technique than article 17; since no reason was given for such a distinction, would it not be possible to reformulate draft article 18 as a simple "without prejudice" clause? And what was meant by "inconsistent with special treaty provisions"? Did the phrase mean that that the treaty specifically excluded resort to the exercise of diplomatic protection or that it would suffice if protection was incompatible with the object and purpose of the treaty?

54. The gist of the draft principles on international liability was that victims of transboundary environmental damage should obtain compensation; consequently, the main elements were the duty to pay compensation, and the necessary instruments, mechanisms or procedures to guarantee such

compensation. The true issue was not the allocation of loss but the allocation of the duty to compensate.

55. In the case of environmental damage, the main difficulty was to prove a causal relationship between the damage and an activity. Draft principle 4 was useful in that it did not require proof of fault. Although the provision established the duty of compensation for damage, without proof of fault or strict liability it did not fully achieve the objective of reducing the victim's burden of proof, for what was needed was a lessening of the victim's duty to prove causation. In order to achieve that objective the burden of proof was usually shifted in such a way that a high probability was sufficient to prove causation. The current practice of strict liability schemes provided for very few exceptions, i.e., in the event of war, natural disasters, etc. But it was difficult to derive such exceptions from draft principle 4 in combination with draft principle 3. Such exceptions should be identified in order to establish the framework for compensation, for otherwise the text might be read as not permitting any exceptions. With regard to the financing of compensation, recent practice had developed a three-tiered approach with three different sources of financing: the polluter, a collective fund, or the State, although the last possibility was limited to exceptional cases, such as nuclear pollution. However, a restriction on ultra-hazardous activities could be justified insofar as the State authorizing them should also assume the resulting risk.

56. Draft principle 5 fell outside the main thrust of the draft principles and should be restricted to the requirement of notification.

57. Draft principle 6 established a duty to provide adequate mechanisms at the national and international levels. However, it remained unclear who would be entitled to claim compensation in cases of damage to the environment. Would non-governmental organizations, for example, be entitled to do so? And would States be entitled to present claims at a State-to-State level or would they, like individuals, be subject to proceedings? It would also be useful to combine draft principle 6, paragraph 2, on international claims settlement procedures, with draft principle 7, on specific international regimes.

58. Lastly, it would be most appropriate to include a provision on dispute settlement, for the main objective of the draft principles was to provide guidance for States in the settlement of disputes related to environmental damage. The draft principles did not lend themselves to becoming a self-executing treaty; they should merely establish some basic rules or guidelines for States that might evolve into legally binding rules following further elaboration.

59. *Mr. Dhakal (Nepal) took the Chair.*

60. **Mr. González Campos** (Spain) said that, generally speaking, the overall thrust of the draft articles on diplomatic protection was appropriate, although certain points of the draft articles and the commentaries still needed to be amended. The language of draft article 1 was not satisfactory because it did not define the basic elements of the subject matter; rather, the definition focused on measures that a State could take for the exercise of diplomatic protection, which gave rise to two adverse consequences. First, there was a reference to the procedures for the settlement of international disputes under Article 33 of the Charter of the United Nations and various General Assembly resolutions, as noted in paragraph 5 of the commentary. The reference to "diplomatic action" covered any procedures employed by a State "to inform another State of its views and concerns", a phrase which was unfortunate, since international practice showed that diplomatic protection consisted mainly of a State bringing a claim against another State concerning certain injuries to its nationals in order to compel that other State to abide by international law. Therefore, it was irrelevant, for the purposes of the definition, that the claim should be accompanied by a protest — although that was often the case — containing a request for an investigation into the facts or a proposal for other means of peaceful settlement. What was really relevant was that the State bringing such a claim espoused the cause of its nationals and stated as much. Second, as a result of the foregoing, the current language of draft article 1 did not distinguish between "diplomatic protection" proper and other related concepts, such as diplomatic or consular assistance to nationals experiencing difficulties as a result of their detention or trial in another State, a situation where none of the criteria for diplomatic protection proper, such as the exhaustion of local remedies, could be invoked. That distinction was acknowledged by the Special Rapporteur in his fifth report when, in reference to article 8 C of the Treaty on European Union, he noted that it was not clear whether that provision contemplated diplomatic protection as

understood in the current draft articles or only referred to immediate assistance to a national in distress. That distinction was not only a reality in daily practice but had been reflected in all recent decisions of the International Court of Justice, such as the *LaGrand* case and the *Avena and Other Mexican Nationals* case, where the Court had found that a State had obligations incumbent upon it under an international convention to render consular assistance without prejudice to the State of nationality being able to exercise diplomatic protection later. From the two examples mentioned, it appeared that draft article 1 would require a more precise definition of diplomatic protection. To that end, he suggested the following wording for draft article 1: "Diplomatic protection consists of formal action through which a State adopts in its own right ..."; the rest of the paragraph would be the same as in the draft. That wording would underscore the fact that the essence of diplomatic protection was the communication through which the State of nationality made a claim for international law, in the person of its nationals, to be respected, thus distinguishing such protection from "diplomatic or consular assistance" to nationals abroad.

61. The commentary on draft article 3, which established the basic rule that only the State of nationality was entitled to exercise diplomatic protection, except as provided in paragraph 2 which referred to draft article 8, under which diplomatic protection might be exercised in respect of stateless persons and refugees habitually resident in a State, was very brief. It was not consistent with the importance of the rule that the article established. For that reason, it should be expanded to include specific references to international jurisprudence, which had repeatedly affirmed that principle of customary law. Furthermore, it could be inferred from the language of the draft that the general rule set out in such judicial decisions, namely, that save for special agreements, nationality was obtained through a systematic interpretation of article 3, paragraph 1, of the draft read in conjunction with article 18. Nevertheless, the latter principle went further, since it excluded the application of the draft articles "where, and to the extent that, they are inconsistent with special treaty provisions". Therefore, a determination would have to be made as to whether the provisions of a special treaty were consistent with the draft articles, which could give rise to a degree of uncertainty and resulting conflicts of interpretation, a situation that would not be desirable. Conversely, if one were seeking assistance from the commentary on the draft, then it should be noted that it was only there that agreements on the reciprocal protection of investments had been taken into account; while that was certainly appropriate, there were other agreements that should have been included in the commentary.

62. Satisfactory amendments had been made to chapter III of the draft articles, concerning legal persons, since it went from article 9, dealing with the general rule established by the International Court of Justice in the *Barcelona Traction* case, to article 11, which included some exceptions for the protection of shareholders. Some doubts arose when the general rule was made more specific by requiring a connection between the company and the State. First, if with regard to the first condition the term "formation" was used instead of "incorporation" because it was a broader term, note should be taken of the confusion that might create in the legal systems of numerous States, since it was applicable to the "other legal persons" referred to in draft article 13. For that reason, it would be better not to depart from the term used in the Court's decision. With regard to the second condition established in that influential decision, "seat of its management" had been added to the condition of "registered office" in article 9; that might be acceptable if "management" were qualified as "effective". However, the addition of "some similar connection" had taken things a step further; that should be deleted, since the recourse to similarity made that formulation too open, despite the fact that the commentary indicated the need for a connection similar to that of "registered office" or "seat of management".

63. With regard to draft article 11, on the protection of shareholders, the negative wording which had been adopted was satisfactory, as were the cases envisaged in that exception to the general rule, which, according to the commentary, should be interpreted in a restrictive manner in order to prevent a plethora of international claims by different States. He had reservations with respect to paragraphs 9 and 10 of the commentary since they both cited the opinion, held by three judges of the International Court of Justice in the *Barcelona Traction* case, in favour of broader intervention by the State of nationality of the shareholders. That did not seem appropriate, since the repeated mention of a minority opinion weakened the rule embodied in that decision. Furthermore, it was not

at all consistent with the conclusion reached in paragraph 11 of the commentary.

64. Finally, article 19 on ships' crews should be excluded from the draft because, among other things, it introduced a special case governed by the law of the sea (specifically, by article 292 of the United Nations Convention on the Law of the Sea) into a set of general rules. Furthermore, the introduction of that case meant a shift in the overall thrust of the draft, which upheld the general rule of diplomatic protection by the State of nationality while permitting an exception for the State of nationality of the ship; that would open up the possibility of double claims being presented. Nor would it be consistent with international practice, which held that such protection was normally exercised by the flag State.

65. **Mr. Mzeme-Mba** (Gabon) said that the issue of diplomatic protection was currently one of the clearest manifestations of the principle set out in Article 2, paragraph 4, of the Charter of the United Nations, according to which all Member States of the Organization should refrain from the threat or use of force in their international relations. He recalled that many conflicts that had tarnished the history of international relations had originated in an intervention by one State on behalf of a national residing in a foreign country.

66. Draft article 1 on the definition and scope of diplomatic protection seemed largely satisfactory, although some clarification would be necessary in order to ensure harmony with the set of draft articles as a whole, since it appeared to take into account only the criterion of nationality, whereas draft article 8 included other criteria for the exercise of diplomatic protection by a State, namely, in the cases of refugees and stateless persons. The definition should therefore be reworked; to that end, paragraph 2 from draft article 3 could be added to draft article 1. That paragraph in fact complemented the definition of diplomatic protection as proposed in draft article 1.

67. Turning to Chapter II, he stressed the need to allow States the discretionary power to set standards for the attribution of nationality; it was not in fact appropriate for international law to establish any limits in that regard. Draft article 4 could have contained a specific reference to the domestic legislation of States, as had been the case in the jurisprudence of the International Court of Justice as well as in the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, article 2 of which stated that any question as to whether a person possessed the nationality of a particular State should be determined in accordance with the law of that State. Furthermore, draft article 4 did not appear to have taken into account the usual criterion adopted under the laws of most States, which established a clear distinction between nationality of origin and acquired nationality. Use of the word "acquire" implied that the Commission was referring only to cases of acquired nationality.

68. As for draft article 7, on multiple nationality, which introduced the concept of predominant nationality, although he acknowledged that diplomatic protection was difficult to exercise in cases where an individual held the nationality of both the applicant State and the State which had committed the wrongful act, the solution proposed in the draft article seemed contradictory. The concept of nationality should be purely a concept of law separate from any consideration of the facts. A concept such as predominant nationality would call into question the principle of the sovereign equality of States. If the Commission's intention was to distance itself from the traditional concept of excluding cases of double nationality from diplomatic protection, it would have been preferable to refer to the criterion of the International Law Institute, which in September 1965 had declared that an international claim on behalf of an individual possessing the nationality of both the applicant State and the respondent State was inadmissible, unless the individual possessed a preponderant bond with the applicant State. The Institute had added that the criteria for determining the preponderant nature of an individual's bond were: his usual place of habitual residence, the State in which he habitually exercised his civil and political rights, and other bonds which would indicate an effective link of residence and interests in and attachment to a State. That solution had the dual advantage of reaffirming the principle of sovereign equality of States and defining it in relation to previously established facts.

69. With regard to draft article 8, he noted that the cases of refugees and stateless persons were dealt with in the relevant international conventions and treaties, but those international legal instruments did not deal directly with diplomatic protection of that category of persons; in fact, they appeared implicitly to exclude them. The Commission was therefore taking an

important step in the development of international law and, given the considerable improvement it would bring in the status of refugees and stateless persons, his delegation supported draft article 8 without reservations.

70. Turning to the controversial issue of the protection of shareholders in a corporation, he expressed support for draft articles 11, 12 and 13 as submitted by the Commission. Given that jurisprudence in that area was often not consistent, it was for the Commission to adopt a middle ground which took into account confirmation of the principle whereby the State of the shareholders in a corporation could not exercise diplomatic protection on behalf of those shareholders in the case of an injury to the corporation, but which would at the same time include exceptions to that principle, allowing the State of nationality of the shareholders to exercise diplomatic protection, in particular when the shareholder was directly injured in his individual rights and above all when the State of nationality of the corporation was alleged to be responsible for the injury it had sustained.

71. Turning to draft articles 14, 15 and 16 concerning the exhaustion of local remedies rule, although he agreed that local remedies must be exhausted before any international claim could be made, he was somewhat sceptical with regard to the exceptions set out in draft article 16. The only purpose of paragraphs (a), (b) and (c) of that article would seem to be to evaluate the good or bad faith of a government in exhausting local remedies. Since institutions for the administration of justice varied from one country to another, he wondered how the conduct of a State could be evaluated in that context. His delegation believed that the conduct of a government should be evaluated *in abstracto* using the "reasonable man" notion. As for paragraph (d), any waiver must be expressly stated and not implied.

72. **Mr. Pager** (Mexico) said that the practice of States relating to the requirement that the conduct of a claimant must be blameless, meaning that his own conduct must not have caused the alleged injury, in order to request that his State exercise diplomatic protection, was far from consistent. His delegation therefore welcomed the Commission's decision to consider that issue once again at its next session.

73. The well-established norm of customary international law according to which local remedies must be exhausted in due time and form as a prerequisite for undertaking an international claim included not only submission of a claim to ordinary tribunals but also to any local authorities empowered to provide internationally acceptable, effective and adequate redress, in respect of the respondent State. In accordance with numerous judicial decisions and most doctrine, the Commission had indicated in its report that the injured alien "is not required to approach the executive for relief in the exercise of its discretionary powers". Diplomatic protection was a central pillar of Mexico's foreign policy. In cases involving Mexican citizens sentenced to death, his Government had maintained in various international forums, including before the International Court of Justice, that mechanisms for executive clemency did not constitute an adequate means of redress because such measures were different from judicial remedies, tended towards confidentiality or secrecy, and excluded standards of legal due process and equality of the parties. Furthermore, decisions resulting from such mechanisms did not allow for appeal and were based principally on considerations of a political nature.

74. His delegation had expressed its disagreement with the previous text of draft article 19 on diplomatic protection for the members of ships' crews. The current text was correct, since it indicated clearly that it was for the State of nationality of the members of the crew of a ship to exercise diplomatic protection. In addition, the right of the State of nationality of the ship to seek redress on behalf of such crew members, irrespective of their nationality, could not be considered to fall under the category of diplomatic protection, precisely due to the absence of the bond of nationality.

75. **Mr. Choi Suk-inn** (Republic of Korea) said that he would focus on draft articles 9, 17, 18 and 19 on diplomatic protection, adopted by the Commission on first reading. He agreed with the basic rule under draft article 9 that the State of nationality of a corporation could exercise diplomatic protection with regard to an injury to that corporation. It was, however, of particular importance to provide clear guidance in determining the State of nationality of a corporation in order to avoid any possible confusion about the right of a State to exercise diplomatic protection.

76. With regard to the criteria used to identify the State of nationality of a corporation, his delegation had little difficulty with the place of incorporation and the presence of the registered office of the company in the

State of incorporation in accordance with its law, as clearly affirmed by the International Court of Justice in the *Barcelona Traction* case. However, the criterion of "the seat of its management or some similar connection" needed to be further clarified, because the ambiguity of that phrase might unnecessarily expand the scope of the State of nationality of a corporation, even if it was assumed that the phrase in question should be read in the context of a registered office or seat of management.

77. The Commission should consider combining draft articles 17 and 18; there was no need to separate them. Given that the traditional right of diplomatic protection pertained to a State, other remedies or dispute settlement mechanisms constituted *lex specialis*, and had priority over remedies pursuant to diplomatic protection.

78. With regard to draft article 19, he reiterated that the right to seek redress on behalf of crew members should rest primarily with the State of nationality of the ship, not the State of nationality of the crew members. However, the protection exercised by the flag State on behalf of crew members could not be considered to fall under the traditional notion of diplomatic protection. By combining two different concepts, the traditional right of the flag State and the concept of diplomatic protection, draft article 19 was introducing a rule hitherto unknown in international law. His delegation believed that draft article 19 should either be excluded from the ambit of diplomatic protection or should be confined to the rule of contemporary international law which entitled the State of nationality of a ship to seek redress on behalf of crew members.

The meeting rose at 12.25 p.m.